United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

No. 74-1896

UNITED STATES COURT OF APPEALS
FOR THE SECOND DISTRICT

UNITED STATES OF AMERICA,

Plaintiff,

-v-

THEODORE DELMAR, BARBARA DELMAR a/k/a BARBARA KAUFMAN, DANIEL M. GENTILE, LEONE GOLDMAN, LOU MARTI, et al.,

Defendants.

STUYVESANT INSURANCE COMPANY,

Appellant.

BRIEF FOR APPELLANT

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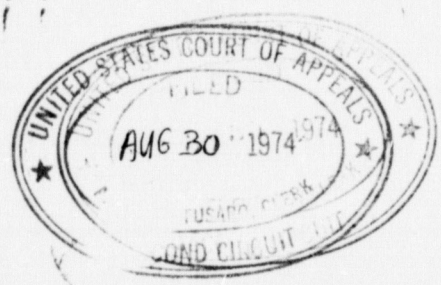

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UNITED STATES COURT OF APPEALS
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Docket No. 74-1896

UNITED STATES OF AMERICA,

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THEODORE DELMAR, BARBARA DELMAR a/k/a BARBARA KAUFMAN, DANIEL M. GENTILE, LEONE GOLDMAN, LOU MARTI, et al.,

Defendants.

STUYVESANT INSURANCE COMPANY,

Appellant.

BRIEF OF DEFENDANT APPELLANT

PRELIMINARY STATEMENT

Stuyvesant Insurance Company, as guarantor on an appeal bond written on behalf of the defendant, Lou Marti, appeals from a judgment of the United States District Court for the Southern District of New York rendered on May 13, 1974, by the Honorable Charles Metzner upon a motion by the Stuyvesant Insurance Company seeking a remission of a forfeiture of the aforesaid defendant's appeal bond.

The defendant, Lou Marti, was indicted on December 1, 1967, by a Federal Grand Jury in the Southern District of New York. The indictment charged the defendant and several others also indicted with two counts of conspiracy to violate Section 1465 of Title 18, United States Code.

On January 30, 1969, the defendant was convicted after a trial by jury before the Honorable Charles Tenney. A subsequent appeal to the United States Circuit Court of Appeals, Second Circuit, was successful and the conviction was reversed on February 3, 1970. United States v. Marti, 421 F2d 1263.

On February 4, 1972, the defendant Marti's bail bond was forfeited for his failure to appear on that date.

Subsequently, on April 10, 19[illegible]3, the defendant Marti appeared in Court and plead guilty to the Second Count of the aforesaid indictment before the Honorable Charles M. Metzner. Marti was thereafter sentenced on May 23, 1973, to one year imprisonment, which term was to run consecutively to a sentence previously imposed under an independant indictment. At the time sentence was imposed, Count One of Indictment No. 67 CR 986 was dismissed.

The defendant is presently serving the term of imprisonment imposed upon him.

STATEMENT OF FACTS

The present appeal involves an application by the Stuyvesant Insurance Company to vacate and remit a forfeiture of an appeal bond dated June 20, 1969. This bond secured the appearance of the defendant, Lou Marti, pending the appeal of his conviction to the United States Court of Appeals. Although the defendant Marti was indicted on December 1, 1967, he remained on bail throughout the pendency of his case. However, after the defendant's conviction on January 30, 1969, his bond was increased to $35,000.00 and on January 31, 1969, Public Service Mutual Insurance Company executed a bond in that amount pending Marti's sentence. On March 14, 1969, the defendant was sentenced to a term of two years imprisonment and his bond pending appeal was set at $35,000.00. Several days later, on March 20, 1969, Public Service Mutual Insurance Company again executed an appeal bond in the foregoing amount on behalf of Marti. Thereafter, on June 20, 1969, a second bond was executed by the Stuyvesant Insurance Company, also

in the amount of $35,000.00 and securing his bail pending appeal. This latter bond is the one the Government is herein seeking to recover on.

As aforesaid, on February 3, 1970, Marti's conviction was reversed by the Court of Appeals. United States v. Marti, 421 F2d 1263. On Febuary 4, 1972, the defendant Marti failed to appear and the bond in question was forfeited. On or about March 12, 1974, Stuyvesant Insurance Company was notified by the Justice Department of the forfeiture which occurred on February 4, 1972, and the funds were demanded.

As a result of the Government's efforts, the defendant Marti was returned to the Jurisdiction of the Southern District, and as aforesaid, on April 10, 1973, he pled guilty to Count Two of Indictment No. 67 CR 986. The Court then remanded the defendant for sentencing.

On May 22, 1974, the defendant was sentenced to a term of one year imprisonment to run consecutive with the sentence imposed under an unrelated independant indictment. Count One of the indictment herein was dismissed.

On March 22, 1974, after Styvesant Insurance

Company received notification of the loss of February 4, 1972, a motion was made to vacate, set aside and remit the forfeiture. The motion was made before the Honorable Charles M. Metzner and was returnable on April 11, 1974.

On May 13, 1974, Judge Metzner rendered his decision on the motion and denied Stuyvesant Insurance Company's application for remission of the forfeiture on Marti's bond.

POSITION OF STUYVESANT INSURANCE COMPANY

The position urged by Stuyvesant Insurance Company involves multiple points of contention.

The equities of the case, the Appellant argues, are strongly in its favor, since a) the judgment appealed from was reversed approximately two years prior to the forfeiture, b) the surety was never notified of the date the Court appearance was scheduled for and further, the Court never formally ordered the defendant Marti's presence prior to the forfeiture of February 4, 1974, c) the defendant subsequently appeared in Court, pled guilty and spared the Government the enormous expense of a retrial and, d) the defendant is presently incarcerated

under the term imposed by the Court and, accordingly, the Appellant has been severely prejudiced by its present failure to have any recourse against the defendant for the loss suffered.

The Appellant further argues that the time interval of over two years between the date of forfeiture on February 4, 1972, and the date of notification by the Government was highly prejudicial to the Appellant and bars recovery thereof. In this respect, the Appellant urges the Court to consider the financial plight to be suffered by the Bonding Agent who wrote the bond. Under the present circumstances he has no available means to recoup the loss which he will suffer if the forfeiture is not remitted.

POINT I

THE FORFEITURE OF THE APPEAL BOND TWO YEARS AFTER THE APPEAL WAS COMPLETED WAS INVALID SINCE ITS CONTINUANCE WAS NOT CONSENTED TO BY THE APPELLANT.

The purpose of an appeal bond is primarily to secure the appearance of a defendant who has been previously convicted of a crime, during the pendency of his appeal of that conviction.

In the case at bar, the conviction was reversed on February 3, 1970. The continuance of the appeal bond from that date until February 4, 1972 without the sureties' consent was a breach of the conditions of the bond. The bond in question was written for the purpose of securing the defendant Marti's appearance during the pendency of the appeal. Yet the Court below entertained applications by the defendant's attorneys and held conferences and, apparently, repeatedly continued the case for a period of two years after the appeal was terminated without ever seeking or obtaining the consent of the sureties to continue the bail (Appendix, pages 29-30). The history of the case reveals that each time there was a change in the status of the case a new bond was written. In this respect it is

noted that the defendant's original bond was increased and rewritten after his conviction on January 30, 1969 and while pending sentence; on March 14, 1969 another bond in the same amount was executed by Public Service Mutual Insurance Company pending appeal; and on June 20, 1969 a second appeal bond was written by the appellant, also securing his appearance pending appeal. Despite these facts, the original appeal bond was forfeited two years after successful prosecution of the appeal was completed without the Appellant's consent to a continuance of that bond at any time.

The bail bond, as a contract of guaranty between the Surety and the Government, should be strictly adhered to. United States v. Eisner, 323 F. 2d 38; Swanson v. United States, 224 F. 2d 795 CA 9th; Dudley v. United States, 242 F. 2d 656 CA 5th; Barnes v. United States, 223 F. 2d 891 CA 5th. Accordingly, any change in circumstances which would affect the risks a surety has assumed should cancel the obligation of the Appellant under the bond unless it has consented to remain liable after the change had occurred.

In interpreting a bail bond the Federal Courts look to the applicable law of the State wherein it is made for guidance. Swanson v. United States, Supra; Heine v.

United States, 135 F 2d 914 (6th Cir. 1943).

Since the bond in the present case was written in New York, it should be interpreted in accordance with the law of this State.

It is a firmly established rule in New York that any material alterations of the terms of an obligation for which performance the surety is bound, when made without consent, releases the surety of its obligations. Indeed, under New York law this rule applies whether or not the surety is harmed by the change. Becker v. Faber, 280 N.Y. 146; St. John's College v. Aetna Indemnity Co., 201 N.Y. 335.

The bail bond being a contract between the Government and the principal and the surety must be subject to the above rule. United States v. Jackson, 465 F. 2d 964 (10th Cir. 1972).

Under New York law it appears quite clear that any change in a defendant's status would require the sureties' consent to validate a continuance of the bail bond. People v. Henry, 33 A.D. 2d 1031 (1970). People v. Public Service Mutual Insurance Co. 49 Misc. 2d 875 (1966). Thus, a surety cannot be liable for forfeiture of a bail bond after a conviction

is reversed if the bond merely secured the defendant's appearance prior to conviction. People v. Henry, Supra. Similarly, a bond cannot be forfeited in New York if the judgment of conviction is pronounced but defendant is released with a direction to surrender at a future date unless the surety has consented to the extension of time for the defendant to surrender. People v. Public Service Mutual Insurance Co., Supra. [United States v. D'Anna, 487 F. 2d 899 (6th Cir. 1973) which came to the same conclusion interpreting Michigan law.]

Applying the dotrine of *STRICTISSIMI JURIS* to the Appellant's bail bond obligations, there exists no basis for the extension of the appeal bond in question to cover the defendant Marti's appearance in the District Court two years after the completion of the appeal. The surety never consenting to such an extension, should be released from its obligation under the bond. Becker v. Faber, Supra.

United States ex Rel. Eisler v. District Director of Immigration & Naturalization at Port of New York, 87 F. Supp. 627, bears on this point. In that case the relator

appealed a discharge of his writ to the Court of Appeals. The Court there, as in the instant case, reversed the District Court and directed the lower Court to hold further hearings. The relator, who was on bail pending the appeal failed to appear at a date set by the District Court for the hearings after his appeal was determined. The Court in Eisler particularly noted that the appeal bond was continued as the bond in the later District Court proceedings by virtue of a specific request by the attorneys for the relator who were at the same time also the attorneys for the surety.

Accordingly, it is submitted that the Court in Eisler clearly implied that without consent of the surety or its agent an appeal bond cannot be continued to secure the appearance of the defendant after the appeal has been terminated.

Certainly, it cannot be validly argued that it was within the contemplation of the parties at the time the bond in question was written that it be continued for two years after its primary purpose had been satisfied.

POINT II

AN ORDER FOR THE DEFENDANT TO APPEAR SHOULD HAVE BEEN MADE PRIOR TO THE DATE OF FORFEITURE OF THE BOND AND NOTIFICATION OF SAID APPEARANCE SHOULD HAVE BEEN FORWARDED TO DEFENDANT.

Rule 46 (e)(2) of the Federal Rules of Criminal Procedure provides for remission of forfeitures of bail bonds "under such conditions as the Court may impose, if it appears that justice does not require the enforcement of the forfeiture". It is submitted that the equities of the case are strongly with the Appellant for the reasons hereinafter set forth.

The bond in question was executed on June 20, 1969, and secured the appearance of the defendant pending the appeal of his conviction to the Court of Appeals. Approximately seven (7) months later, on Febuary 3, 1970, the Court of Appeals reversed the conviction and directed a new trial. Yet it was not until two years later, on February 4, 1972, that this Appeal Bond was called and forfeited. The record fails to reveal any scheduled appearance for the defendant Marti prior to the latter date. During that period of time the defendant fled the jurisdiction of the Court and became a fugitive. The delay between the

date of reversal of the conviction and the date of the forfeiture is overwhelming, and, it is submitted, was not contemplated by the parties to the bond. It is also significant to note that the bond which was forfeited appears from the record to be a $50,000.00 bond and not the $35,000.00 bond which the Appellant had executed (Appendix, page 44A).

It is settled law that a bail bond must be strictly construed. United States v. Eisner, 323 F. 2d 38; Swanson v. United States, 224 F. 2d 795, C.A. 9th; Dudley v. United States, 242 F. 2d 656, C.A. 5th; Barnes v. United States, 223 F. 2d 891 C.A. 5th.

The pertinent parts of the bond in question provides, with regard to the defendant's appearance in Court that he ". . . shall appear before the District Court of the United States for the Southern District of New York on such day or days as shall be set for a retrial of said case, provided the judgment of the District Court of the United States for the Southern District of New York is reversed by the Second United States Court of Appeals . . ." (Appendix, page 36).

Although the judgment of conviction was reversed by the Court of Appeals on February 3, 1970, no date for retrial was set until February 4, 1972, when the bond

was forfeited. During this period of time several conferences were had between the Court and counsel for both sides. It appears that the retrial of the indictment was delayed to await the decision of the United States Court of Appeals in regard to another appeal of an independent conviction, which the defendant Marti was then prosecuting (Appendix, page 29). Additionally, thereafter, the matter was again delayed because of an application for Certiorari to the United States Supreme Court on an appeal also involving Marti. As a result of those delays, the trial date was delayed to Feburary 4, 1972, when a bond in the amount of $50,000.00 was forfeited. [In this respect it is noted that the decision of the Honorable Charles M. Metzner refers to the forfeiture date as February 2, 1972, although the record reveals a forfeiture on February 4, 1972 (Appendix, pages 30,44A)]. Furthermore, the bond which was ordered forfeited was in the amount of "$50,000.00" not the $35,000.00 bond written by Stuyvesant Insurance Company (Appendix, page 44A). In Babb v. United States, 414 F. 2d 719, C.A. 10th the Court held that

"when a Court advances an

> appearance date so as to require the presence of a principal at a time before the day specified in the Bond then notice similar to that given herein must be had before a forfeiture may be ordered".

It is noted that the defendant in the Babb case was notified of a Court Order directing him to appear on a date certain for trial; the notice having been sent by the Court to the defendant by Certified Mail. Furthermore, in United States v. Eisner, 323 F 2d 38, the Court held that there can be no forfeiture of a bond for failure of a defendant to appear unless there is a direction by the Court to be disobeyed.

Reading Babb and Eisner together, it appears quite clearly that an Order of the Court should have been entered directing the defendant's appearance in Court on February 4, 1970 before the bond was forfeited and that notice of the date set should have been given the defendant prior thereto in order to strictly comply with the terms of the bond. This is especially true since no scheduled appearance had been set for two years from the time the conviction was reversed. Dudley v. United States, 242 F 2d 656, C.A. 5th.

POINT III

THE TWO YEAR DELAY BETWEEN THE DATE OF REVERSAL OF DEFENDANT'S CONVICTION AND DATE OF FORFEITURE, TOGETHER WITH THE SUBSEQUENT TWO YEAR DELAY BEFORE NOTIFICATION OF THE FORFEITURE WAS GIVEN TO THE APPELLANT SEVERELY PREJUDICED THE APPELLANT'S RIGHTS AND ABILITIES TO RECOUP ITS LOSS AND JUSTIFIES REMISSION OF THE FORFEITURE

The prejudice to the Appellant caused by the failure of the Government to act diligently was extensive. During the initial interval following reversal of the conviction until the date of forfeiture the defendant Marti became a fugitive.

Furthermore, another interval of over two years passed from the time of the forfeiture until notice and demand for payment was made upon the Appellant. By this time, however, the defendant Marti had been sentenced on his plea, was serving the term imposed and had no assets from which the Appellant could recoup its loss.

It is submitted that the amount of the forfeiture should bear some reasonable relationship to the "cost and inconvenience to the Government of regaining custody and preparing to go to trial". United States v. Kirkman, 426 F. 2d 747, C.A. 4th. Additionally, the prejudice

suffered by the Surety should also be considered in assessing the amount of the forfeiture.

In the case at bar, the Agent who wrote the bond has already paid the Government $5,000.00 on another bond which was forfeited and which was written on behalf of the defendant Marti. Indeed, the Bonding Agent had indicated in his affidavit in support of the motion for remission of the forfeiture, that there was no collateral taken for the bond in question and that he was personally liable for the sum forfeited (Appendix, page 26-27). Certainly, the delay in notification of the forfeiture worked to the Appellant's prejudice under the circumstances, since there are no longer any funds or assets of the defendant Marti's from which the Appellant, or more significantly, the Agent, may recoup all or part of his loss.

CONCLUSION

The judgment of the District Court should be reversed in all respects and the forfeiture should be remitted.

Respectfully Submitted,

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UNITED STATES ATTORNEY